

SEP 13 2006

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U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORBERTO TAPIA-SORIANO; MARIA
DEL SOCORO TAPIA-ORTIZ,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 05-72501

Agency Nos. A75-765-331
A78-112-330

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted September 11, 2006 ^{**}

Before: PREGERSON, T.G. NELSON, and GRABER, Circuit Judges.

Norberto Tapia-Soriano and Maria Del Socoro Tapia-Ortiz, husband and wife and natives and citizens of Mexico, petition pro se for review of the Board of Immigration Appeals' ("BIA") order denying their motion to reopen removal

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

proceedings. To the extent we have jurisdiction, it is conferred by 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen. *Iturribarria v. INS*, 321 F.3d 889, 894 (9th Cir. 2003). We grant in part and dismiss in part the petition for review.

Even if Petitioners have inadequately challenged the BIA's denial of their motion to reopen for failing to depart within the voluntary departure period, we retain discretion to review that issue because the government briefed it. *See Ndom v. Ashcroft*, 384 F.3d 743, 751 (9th Cir. 2004). At the time Petitioners filed their motion to reopen with the BIA, their period of voluntary departure had been stayed in this court, where Petitioners sought review of the BIA's underlying order and filed a motion for stay of removal. *See* 9th Cir. Gen. Order 6.4(c); *Desta v. Ashcroft*, 365 F.3d 741, 743-44 (9th Cir. 2004). Because Petitioners filed their motion to reopen within the voluntary departure period, and because this court's stay was still in effect at the time the BIA denied the motion, the BIA abused its discretion in denying the motion for failure to voluntarily depart. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1288-89 (9th Cir. 2005) (holding that where a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during

the period the BIA is considering the motion). Accordingly, we remand for the BIA to consider the motion to reopen on the merits.

To the extent Petitioners contend that the BIA should have exercised its sua sponte power to reopen removal proceedings, we lack jurisdiction to review that contention. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

PETITION FOR REVIEW GRANTED in part; DISMISSED in part.